

11-4643(L)

In Re: Ambac Fin. Grp.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

1:08-cv-00411-NRB

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of July, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: August 3, 2012

IN RE: AMBAC FINANCIAL GROUP, INCORPORATED

PUBLIC SCHOOL TEACHERS' PENSION & RETIREMENT
FUND OF CHICAGO, ARKANSAS TEACHERS RETIREMENT
SYSTEM, PUBLIC EMPLOYEES' RETIREMENT SYSTEMS
OF MISSISSIPPI, SCOTT REIMER, individually and
on behalf of all others similarly situated,
STANLEY TOLIN, EDWARD WALTON, PAINTING
INDUSTRY INSURANCE AND ANNUITY FUNDS, MARKO
BABIC, KEVIN PARKER, individually and on
behalf of all others similarly situated,
MINNEAPOLIS FIREFIGHTERS' RELIEF ASSOCIATION,
on behalf of itself and all others similarly
situated,
Plaintiffs-Appellees,

POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY
OF DETROIT,
Plaintiff-Appellant,

-v.- 11-4643 (Lead)
12-59 (Con)

AMBAC FINANCIAL GROUP, INC., ROBERT J.
GENADER, PHILLIP B. LASSITER, SEAN T. LEONARD,
THOMAS J. GANDOLFO, JOHN W. UHLEIN, III, DAVID
W. WALLIS, MICHAEL A. CALLEN, JILL M.
CONSIDINE, W. GRANT GREGORY, THOMAS C.
THEOBALD, LAURA S. UNGER, HENRY WALLACE,
PHILIP N. DUFF, BANC OF AMERICA SECURITIES,
LLC, CITIGROUP GLOBAL MARKETS INC., GOLDMAN,
SACHS & CO., HSBC SECURITIES (USA) INC., J.P.
MORGAN SECURITIES INC., MERRILL LYNCH, PIERCE,
FENNER & SMITH INCORPORATED, UBS SECURITIES
LLC, WACHOVIA CAPITAL MARKETS, LLC,
Defendants-Appellees,

BANC OF AMERICA SECURITIES, LLC, CREDIT SUISSE
SECURITIES USA LLC, KEEFE, BRUYETTE & WOODS,
INC., KPMG LLP,
Defendants,

UNITED STATES TRUSTEE,
Trustee.

- - - - -X

FOR APPELLANT: Denis F. Sheils (Barbara L.
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Philadelphia, Pa.

FOR APPELLEES: Rochelle Feder Hansen (Steven B.
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Teachers' Pension & Retirement
Fund of Chicago, Arkansas
Teachers Retirement System and
Public Employees' Retirement
System of Mississippi),

Peter C. Hein (C. Lee Wilson, on
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(Counsel for Ambac Financial
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N.Y. (Counsel for Ambac
Financial Group, Inc.).

Consolidated appeals from judgments of the United
States District Court for the Southern District of New York
(Buchwald, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
AND DECREED that the judgments of the district court be
AFFIRMED.

Police and Fire Retirement System of the City of
Detroit ("PFRS") appeals from: (1) the September 28, 2011,
judgments of the District Court approving, pursuant to
Federal Rule of Civil Procedure 23(e), a settlement between
Ambac Financial Group and plaintiffs in consolidated
shareholder class actions, and (2) the December 29, 2011,
judgment of the District Court affirming the Bankruptcy
Court's order approving the settlement pursuant to
Bankruptcy Rule 9019. As part of the settlement, Ambac
released any claims that could be brought on its behalf
against its officers and directors. PFRS, a nominal
plaintiff in a shareholder derivative action, argues that
Ambac lacked authority to release the derivative claims.

"[T]he filing of [a] bankruptcy petition immediately
alter[s] the rights of the [c]orporation and the manner in
which its rights [can] be asserted." Mitchell Excavators,
Inc. v. Mitchell, 734 F.2d 129, 131 (2d Cir. 1984).
"[W]hile normally the fiduciary obligation of officers,

1 directors and shareholders 'is enforceable directly . . .
 2 through a stockholder's derivative action, it is, in the
 3 event of bankruptcy of the corporation, enforceable by the
 4 trustee'" or debtor-in-possession.¹ Id. (quoting Pepper v.
 5 Litton, 308 U.S. 295, 307 (1939)). Accordingly, when Ambac
 6 filed for bankruptcy, the derivative claims became property
 7 of the debtor-in-possession, Ambac.

8 "[U]nder certain circumstances a shareholder may assert
 9 a cause of action of the debtor even after the commencement
 10 of a bankruptcy proceeding. For example, the trustee may
 11 abandon a particular claim, making it possible for others to
 12 assert it. Also, the bankruptcy court may order the trustee
 13 to abandon a claim." Id. (citations omitted). The
 14 bankruptcy court never ordered Ambac to abandon the
 15 derivative claims and found that PFRS never petitioned for
 16 such an order, a finding PFRS challenges only in its reply
 17 brief. See United States v. Yousef, 327 F.3d 56, 115 (2d
 18 Cir. 2003) ("We will not consider an argument raised for the
 19 first time in a reply brief."). PFRS argues that Ambac
 20 unilaterally abandoned the claims by agreeing to their
 21 release. But in cases of abandonment, "some proceeding in
 22 the bankruptcy court must take place before a shareholder
 23 can assert the right directly." Mitchell, 734 F.2d at 132;
 24 see also 11 U.S.C. § 554(a)-(b) ("After notice and a
 25 hearing, the trustee may abandon any property of the estate
 26 On request of a party in interest and after notice
 27 and a hearing, the court may order the trustee to abandon
 28 any property of the estate"). Moreover, Ambac
 29 released the claims as part of a settlement with (inter
 30 alia) its directors' and officers' liability insurers, who
 31 had asserted that they were unwilling to pay absent the
 32 release. Accordingly, the derivative claims belong to the
 33 Ambac estate and PFRS lacks a cognizable interest in their
 34 release. See Sobchack v. Am. Nat'l Bank & Trust Co. of
 35 Chicago (In re Ionosphere Clubs, Inc.), 17 F.3d 600, 604 (2d
 36 Cir. 1994) ("[T]he claims submitted by the [shareholders] to
 37 the bankruptcy court are derivative They therefore

¹ "[D]ebtors-in-possession and reorganization trustees have essentially the same rights, powers, and duties." Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 n.1 (2d Cir. 1993) (citing 11 U.S.C. § 1107(a)).

1 belong exclusively to the [debtor's] Estate and were
2 extinguished by its settlement of those claims.").

3 Having concluded that PFRS lacks an interest in the
4 derivative claims, we need not consider the other arguments
5 it raises. Accordingly, we hereby **AFFIRM** the judgments of
6 the district court.

7 FOR THE COURT:
8 CATHERINE O'HAGAN WOLFE, CLERK
9
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A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


